United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

9

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,049

UNITED STATES OF AMERICA

v.

TERRANCE G. BLAIR,

Appellant.

Appeal From The United States District Court
For The District Of Columbia

Cr. 202-69

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Attorney for Appellant
(Appointed by this Court)

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TABLE OF CASES

OTHER REFERENCES

*Cases chiefly relied upon are marked by asterisks.

STATEMENT OF ISSUE PRESENTED

Whether an in-court identification of appellant by a witness denied appellant due process of law where the witness had made a prior identification of appellant at a preliminary hearing under circumstances that had made it unnecessarily suggestive and conducive to irreparable mistaken identification.

This case has not previously been before this Court under any other name or title.

REFERENCES TO RULINGS: None

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,049

UNITED STATES OF AMERICA

v.

TERRANCE G. BLAIR,

Appellant.

Appeal From The United States District Court
For The District Of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from conviction for violations under Title 22, Sections 2901, 3202, 502, of the District of Columbia Code. The United States District Court had jurisdiction to try appellant. This Court has jurisdiction of this appeal under Title 28, Section 1291, of the United States Code.

STATEMENT OF THE CASE

A. Statement of Proceedings

In an eleven-count indictment filed February 12, 1969, appellant was charged along with Charles E. Jones and Alfred L. Sweeney with armed robbery, robbery, and assault with a dangerous weapon, in violation of 22 D.C. Code 2901, 3202, 502, on November 12, 1968. The offenses took place at King's Liquor, a liquor store located at 3223 - 23rd Street, S. E., Washington, D. C. Appellant was arrested on November 21, 1968, and appeared at a preliminary hearing before the United States Commission for the District of of Columbia on December 3, 1968. He was arraigned on February 28, 1969, and pleaded not guilty. Defendant Sweeney withdrew his plea of not guilty and entered his plea of guilty to count 7 (Armed Robbery) on May 20, 1969. Defendant Jones had been returned to St. Elizabeth's Hospital for mental examination of his competence to stand trial and was still there when appellant's motion for severance was granted on September 12, 1969. On November 19, 1969, trial commenced before Judge Green and a jury. Counts 10 and 11 were dismissed and the names of the other two defendants were deleted from the indictment. On November 20, 1969, the trial concluded with verdicts of guilty on two counts of armed robbery and two counts of assault with a dangerous weapon. This appeal was noted on February 19, 1970.

B. Preliminary Hearing

On November 21, 1968, appellant was arrested and taken before

the United States Commissioner. The case was continued to December 3, 1968, in order to arrange for Legal Aid counsel for appellant. The preliminary hearing took place on that date and appellant with co-defendants Jones and Sweeney were present. Also present were counsel -- one for appellant and one for the other defendants -- and an Assistant United States Attorney.

Richard Donaldson, a clerk in King's Liquor who was present at the robbery, testified that he had previously identified defendant Sweeney in a lineup but pointed to defendant Jones. (P.H.Tr. 10, 11) He then identified Sweeney and appellant. (P.H.Tr. 12) He testified that he had been shown photographs the day of the robbery and twice the next day. (P.H.Tr. 15) He had identified two photographs the first day and two the next day but did not remember when he identified the photographs of Sweeney and appellant. (P.H.Tr. 23)

Detective Harry A. Noone of the Robbery Squad testified that he had investigated the robbery and had been present at the lineup on November 19, 1968, when defendant Jones had been identified by Fred Lukat, the manager of King's Liquor. Mr. Lukat was not at the hearing because of illness. (P.H.Tr. 26-29)

The Commissioner held the three defendants for the grand jury. (P.H.Tr. 29)

C. Motion To Suppress In-Court Identification

At the trial, the jury was excluded while Judge Green held a hearing on the identification of appellant. Fred Lukat was the first witness and testified as follows:

1. He was the manager of King's Liquor and was present on November 12, 1968, when the store was robbed. (Tr. 6)

2. At about 3:30 p.m., he was in the back of the store, behind a gate, checking in merchandise. The store was on one floor with about ten feet partitioned off and entered through a gate. (Tr. 6)

3. A man put a gun on him and another put a gun on the helper from Kronheim Company. He was frisked for a gun, which he did not have, and in response to a question, said that the gun was by the cash register. He was marched to the cash register and the man took the gun and money from the register, after the witness opened it. He was right beside the man and saw his face clearly. The lights were on. (Tr. 17, 18)

4. Mr. Donaldson, the clerk in the store, was marched to the back to show them the safe and said that he didn't know the combination, but that the witness did. Appellant then walked the witness to the safe, had him open it, and took the money out of it. (Tr. 8, 9)

5. He had a good look at all the men. He was at the safe four or five minutes, and two minutes at, going to, and returning from the register. (Tr. 10)

6. He saw Detective Noone the same day and gave him a description of the men. He said appellant had been wearing a dark coat and a hat and what looked like a little goatee, and was five feet six or seven inches, and 140 pounds. (Tr. 11)

7. The next day, Detective Noone showed him some photographs

and he made two identifications. (The Government had seven photographs marked for identification.) (Tr. 12)

8. He identified appellant as the "main speaker" and the one who had taken him to the cash register. (Tr. 14)

9. The photograph of appellant had ink marks on it to resemble a goatee that had not been on it when Hoone had shown it to him. (Tr. 15)(Def. 2)

10. He had described only two of the men to the police. Appellant's gun was physically touching him. He saw the gun. He saw appellant's hands. (Tr. 16, 17)

11. He identified appellant's photograph even though it did not show a goatee or a hat. He was able to do so because of the nose and eyes. (Tr. 21)

On redirect examination, he testified that he had identified two men in a lineup. (Tr. 23)

The next witness was Richard Donaldson who testified as follows

1. He was employed at King's Liquor and present at the robbery. (Tr. 26)

2. He was behind the counter in the store, empty of customers, when two men walked in and went to the back. Two others went to the counter, put a pistol on him, and marched him to the front of the store, asked him where the safe was, marched him to it, and told him to open it. He said he could not, but that Lukat could. Lukat was brought to the safe and opened it. The man took the money from the safe and took personal possessions from

the witness and Lukat. (Tr. 26, 27)

3. He was able to see the face of the man who took Lukat to the safe and identified appellant as that man. (Tr. 28)

4. On the same day, he gave Detective Noone a description of appellant: a leather coat and a hat, five feet seven or eight inches, 145 or 150 pounds. (Tr. 29)

5. The following day, he identified two photographs. (The Government had two photographs marked for identification.) He identified appellant's photograph but said that he did not remember the ink marks being on it. (Tr. 30, 31)(Def. 2)

On cross examination, the witness testified as follows:

6. Appellant was 18 to 20 years old at the time he saw him at the store. (Tr. 32)

7. All the men wore leather coats. (Tr. 32)

8. The closest he was to appellant was two to three feet. He saw appellant's gun. He saw his hands. Appellant did not have a moustache -- just some fuzz. He did not remember if appellant had a beard. (Tr. 32, 33)

The next witness was Detective Harry A. Noone who testified as follows:

1. On November 12, 1968, he went to King's Liquor and was given descriptions of men by Lukat and Donaldson. 4 negro males; 2 were five feet seven or eight inches, dark skinned, medium brown complexioned, dark coat and dark pants, and dark automatic. (Tr. 34, 36)

2. On the following day, he returned to the store and

showed Lukat some photographs. He identified the seven photographs the Government had marked for identification as those he had shown Lukat. He stated that the inking on appellant's photographs had been put on by his partner after Lukat and Donaldson had identified it. He showed the same photographs to Donaldson who identified appellant's photograph. (Tr. 36)

On cross examination, the witness testified as follows:

3. He had shown Lukat and Donaldson about 30 or 40 photographs. (Tr. 38)

4. Appellant's photograph had been taken on July 26, 1963. (Tr. 41)(Def. 2)

The court found that the two identifying witnesses had been able to identify independently the appellant from photographs, and in the courtroom, and ruled that both identifications would stand. (Tr. 46)

D. The Trial

The first witness was Fred Lukat who testified as follows.

1. Appellant and Sweeney were the two men who came to the back of the store first and put guns on him. (Tr. 70) He identified appellant, guessed that he had been in his presence about eight minutes and that appellant had been two feet in front of him when he first put a gun on the witness. (Tr. 74, 75)

On cross examination the witness testified as follows:

2. He was shown a photograph of a man and testified that it might have been shown to him. (Tr. 77)(Def. 1)

3. The men did not all have the same coat or hat.

4. He had observed appellant's hands 'real good."

The rest of his testimony was a repetition of that given in the hearing on the Motion.

The next witness was Richard Donaldson who testified as follows:

1. He identified appellant who had been with him at the safe for three, four or five minutes. (Tr. 95)

2. He gave Detective Noone a description of all five men. (Tr. 97)

3. He could not say for sure that he had seen the first photograph shown by appellant's counsel to Lukat. (Tr. 98)(Def. 2)

On cross examination he testified that he had told the police that all four men inside the store wore leather coats.

The rest of his testimony was a repetition of that given at the hearing on the Motion.

The next witness was Albert Desper who testified that he was unloading his truck of liquor outside King's Liquor when the robbery of the store took place, but did not see any of their faces. (Tr. 107)

The next witness was was Detective Harry A. Noone whose testimony was the same as in the hearing on the Motion.

On cross examination, he testified as follows:

1. That the number one man who did the talking was the only one wearing a dark leather jacket. (Tr. 117)

2. The number one man was Alfred Sweeney. (Tr. 118)

3. The photograph of appellant identified by Lukat and Donaldson was taken July 16, 1963. (Tr. 120)

4. He had seen the subject of the photograph (Def. 1) but had not shown it to Lukat and Donaldson. (Tr. 120) He did not remember his name, but it was not appellant. (Tr. 122)

On redirect examination, he identified a photograph of appellant taken November 20, 1968. (Tr. 123)(Govt. 7)

The first witness for the defense was Donald Brown who spent a 14-hour day with appellant between November 11 and 14, 1968, but did not remember the date. (Tr. 135)

The next witness was Alfred Sweeney who had pleaded guilty to armed robbery as a co-defendant in the instant case. He testified that appellant was not present at the robbery. (Tr. 138)

Upon cross examination, he testified as follows

1. He had signed a statement ten days before entering his plea of guilty, which he read from the stand. It stated that appellant and Jones had held up Lukat and that he was the one who held up the driver outside the store. (Tr. 141)

2. He had told his attorney before he signed the statement that he wished the other two names erased. (Tr. 142)

Appellant then testified as follows

1. On November 12, 1968, he was drinking with Donald Brown from 12:30 p.m. to 6:00 p.m. in a house on Girard Street, when he was told by a third person that a robbery had been committed. (Tr. 148)

2. He then walked through Meridian Park with the four men

who had committed the robbery. Wilbur Robinson drew a pistol on him and demanded his gun. He said that he didn't have it and ran. He was shot twice in the back. Two police officers in a squad car took him to the hospital. He told them that he had been shot because it was thought that he was going to tell about the robbery. (Tr. 149, 150)

3. The next day he told a detective about the robbery and on the second or third day, he gave Detective Moone information. (Tr. 150)

4. Detective Moone arrested him in the hospital and took him to the Robbery Squad office. (Tr. 152)

5. He identified Def. 1 as a photograph of Wilbur Lee Robinson. (Tr. 153)

6. He had never been in King's Liquor store. (Tr. 154)

On cross examination, he testified as follows:

7. He had known Jones since childhood and Sweeney for three to four years and saw them on November 12, 1968, in an apartment in the 1400 block of Girard Street. (Tr. 155)

8. He did not know which of the four men shot him. (Tr. 158)

9. Detective Moone asked him while in the hospital if he knew Wilbur Robinson.

On redirect examination, he testified that he had a fungus growth on his fingers which he had had for three to four years. (Tr. 163)

The Government called Joseph Lyman, court-appointed attorney for Alfred Sweeney, who testified that Sweeney had signed a

statement in his presence and after a conference regarding its contents. (Tr. 173)

The Government recalled Detective Noone who testified that he had not seen appellant between November 12, 1968, and November 20, 1968, had not discussed the robbery with him until he took him to the Robbery Squad office on November 20, 1968, and that appellant had never mentioned Wilbur Lee Robinson. (Tr. 175)

STATEMENT OF POINT

Plain error substantially affecting appellant's rights was committed when an in-court identification was admitted into evidence because it was tainted by a prior identification at a preliminary hearing held under circumstances unnecessarily suggestive and conducive to irreparable mistaken identification as to deny appellant due process of law.

STATUTES INVOLVED

§ 22-2901. Robbery.

Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

§ 22-3202. Committing crime when armed -- Added punishment.

If any person shall commit a crime of violence in the District of Columbia when armed with or having readily available any pistol or

other firearm, he may, in addition to the punishment provided for the crime, be punished by imprisonment for a term of not more than five years; upon a second conviction for a crime of violence so committed he may, in addition to the punishment provided for the crime, be punished by imprisonment for a term of not more than ten years; upon a third conviction for a crime of violence so committed he may, in addition to the punishment provided for the crime, be punished by imprisonment for a term of not more than fifteen years; upon a fourth or subsequent conviction for a crime of violence so committed he may, in addition to the punishment provided for the crime, be punished by imprisonment for an additional period of not more than thirty years.

§ 22-502. Assault with intent to commit mayhem or with dangerous weapon.
Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years.

SUMMARY OF ARGUMENT

At a preliminary hearing before the United States Commissioner, appellant was identified by an eyewitness under circumstances so unnecessarily suggestive as to deny him due process of law and therefore fatally taint a later in-court identification. Although appellant, who had counsel, was permitted to waive an opportunity for a lineup, his right to fundamental due process was violated by the identification at the hearing. The Government failed to show by clear and convincing evidence that the in-court identification had an independent source.

ARGUMENT

The Government's case rested solely on the identification of appellant by eyewitnesses. There were four persons, other than the robbers, who were present at the event:

1. The helper of the liquor distributor's truck who was in the back of the store with Lukat when the two men entered and put guns on them. The unnamed helper was not called.

2. The driver of the truck, Desper, did not identify appellant.

3. The clerk of the store, Donaldson, identified appellant but his identification was tainted by his identification of appellant at the preliminary hearing.

4. The manager of the store, Lukat, who first identified appellant corporeally one year and one week after the event.

Under the doctrine enunciated in Stovall v. Denno, 388 U.S. 298, 302, 87 S. Ct. 1967, 18 L. Ed.2d 1199, a defendant is entitled to relief if "the confrontation *** was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law." The confrontation in Stovall was held in a hospital room. In United States v. Kemper, _____U.S. App. D.C. _____, _____ F.2d _____(decided July 10, 1970) the court approved its application to a station-house confrontation. The rule should be applied to the confrontation at the preliminary hearing also, as it cannot be denied, that the "totality of the circumstances surrounding it was unnecessarily suggestive." Appellant's counsel, the Assistant

United States Attorney and the United States Commissioner said as much in advising him of his "right" to a lineup. The Commissioner particularly described the jeopardy facing appellant when he told him, out of his considerable experience in this area:

> Now, if you were at a line-up, he would be looking at you in a much larger group of men that are lined up. Here, of course, the witness will see you sitting at this table with only three defendants, and if you feel that you'll be prejudiced - in other words, that it would be against your best interests to be picked out of three rather than a larger line-up, which would involve maybe a dozen or two dozen other people, we'll continue your case. But if you want to go forward at this point, we'll go forward. (P.H.Tr. 5)(emphasis supplied)

This offer to continue the case was not accepted by appellant who stated:

> Well, I feel that rather than five or six or one person, if that man is honest and he look out of seeing the person that was in his place, then I feel that it's no need for me to be waiting for a line-up of any sort. He can see me just as well from here as he can in a line-up. (P.H.Tr. 5)

And despite the danger to appellant of such a confrontation the Commissioner told him:

> I just wanted you to understand that you have a right to be picked out of a line-up, and that you are waiving or saying that you are going to do away with your right to be picked out of a line-up and that you'll take your chances on the witness identifying you at this hearing or not identifying you. Is that clear? (P.H.Tr. 6)

To which appellant replied, "Yes, sir." (P.H.Tr. 6) He would take his chances.

It is not necessary to speculate on why he took his chances in this critical proceeding. His answers bespoke a confidence that the witnesses would not identify him. Also, however, he made clear his reluctance to wait for a lineup. He rejected a continuance - or, it should be said, another continuance - because he had been before the Commissioner on November 21, the day of his arrest. The hearing had been continued for the purpose of obtaining counsel for appellant from Legal Aid. He wanted to get out of jail and this seemed the quickest way to accomplish that. It was not the best way, of course, as all warned him.

The potential danger of this type of confrontation was increased by the particular circumstances of this one. As appellant's counsel put it

> The witness who will be testifying today has already made at least one identification in a line-up of one of the co-defendants, either Mr. Sweeney or Mr. Jones. I'm not sure which, so that he will see at least one man that he has identified before, and that could conceivably make him more hasty to make other identifications. (P.H.Tr. 6)

The appellant understood this danger, also, and stated:

> You're trying to say, since he identified one, he might take the attitude to say that the other two were the people that was involved. (P.H.Tr. 6)

The record does not show whether appellant knew of yet another danger the witness's co-worker, Lukat, had already identified the other co-defendant, Jones. (P.H.Tr. 27)

Thus, the picture of the preliminary hearing shows the witness confronting three defendants, one of whom he had already identified

and another whom his co-worker had already identified. This set-up was more hazardous than a "one-man showup. As stated in United States v. Wade, 388 U.S. 218, 235, 87 S. Ct. 1926, 18 L. Ed.2d 1027 (1967): "It is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed guilty by the police."

This danger of a confrontation so unnecessarily suggestive and conducive to irreparable mistaken identification could have been avoided by applying to the preliminary hearing the warning of the court in United States v. Wade, supra, at 236

> Thus in the present context where so many variables and pitfalls exist, the first line of defense must be the prevention of unfairness and the lessening of the hazards of eyewitness identification at the lineup itself.

If the preliminary hearing identification violated due process, it would subject the in-court identification to challenge under Stovall. The latter identification, though sometimes dramatic, is a mere confirmation that the person previously identified is then on trial. In fact, in this case the appellant had been ordered by the court to stand and be identified to the jury on voir dire - in the presence of the witnesses. It has been noted in WALL, EYE WITNESS IDENTIFICATION IN CRIMINAL CASES, 74, (1965), that if the witness makes an identification he will usually reaffirm it at trial.

However, the in-court identification would not be foreclosed if the Government established by clear evidence that the in-court identification had an independent source. Clemons v. United

States, 133 U.S. App. D.C. 27, 34, 408 F.2d 1230, 1237, (1968).

The trial judge at the conclusion of the hearing on the Motion ruled that witnesses Lukat and Donaldson had been able to identify the appellant independently, in the first instance from the photographs and then in the courtroom. (Tr. 46)

The argument against the in-court identification in the courtroom has already been made as to Donaldson. The validity of the photographic identification as to both must be examined to determine if they were independent sources for the courtroom identifications.

The potential danger of photographic evidence lies in its suggestiveness. The number and manner of showing the photographs to the witnesses seem unobjectionable except for the inked "goatee" on appellant's photograph. Both witnesses had told the police that one of the robbers had a goatee. (Tr. 11, 37) If the inking had been done before or during the showing to the witness, it would have invalidated the identification.

The explanation given by Detective Noone was that his partner, Detective Jones, had done the inking, but for what purpose he did not say. (P.H.Tr. 40) This explanation should not be treated as just a matter of credibility. The possibility of police guidance is too strong. The inking went to the validity of the identification and fairness should require that the Government give fuller testimony on the subject as part of its burden to produce clear and convincing evidence of an independent source. It was not shown that Detective Jones was not available to testify about the inking. It should be considered that at the time of the showing appellant

was in the hospital and had already given the police information about the robbery. (Tr. 150) It would be expected that he had become a suspect at that time. If so, there was no necessity for showing his photograph. A corporeal identification was called for and could have been arranged. A lineup was held for Jones and Sweeney on November 19, at which appellant was not present because of his hospitalization. Appellant could have had one on November 21 when he was taken before the Commissioner, or arrangements made for one to be held during the period of continuance of the hearing until December 3. A lineup was feasible under the circumstances but the police apparently were satisfied by the photographic identification and appellant's own story about the robbery that they had the right man.

Why a corporeal identification is more reliable than a photographic identification and should be preferred is well stated in WALL, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES, 68

> Where a photograph has been identified as that of the guilty party any subsequent corporeal identification may be based not upon the witness' recollection of the features of the guilty party but upon his recollection of the photograph. Thus, although a witness who is asked to attempt a corporeal identification of a person whose photograph he has previously identified may say 'That's the man that did it' what he may actually mean is, 'That's the man whose photograph I identified.'

While the Government's case was based entirely on identification, only two of the four persons who were present, other than the robbers, identified appellant.

One identified him corporeally at a preliminary hearing held two weeks after the event under circumstances which deprived appellant of due process of law. The other identified him corporeally in court one year and one week after the event. Both had identified him from photographs improperly employed which caused them to err in identifying appellant's photograph. Simmons v. United States, 390 U.S. 377, 384, 88 S. Ct. 967, 19 L. Ed.2d 1247 (1968)

Both in-court identifications were inadmissible: Donaldson's because it was tainted by his preliminary hearing identification which had denied appellant due process of law and it was not otherwise supported by an independent source, and Lukat's because it was tainted by his prior identification which was a photographic one which denied appellant due process of law.

The admission of the in-court identifications substantially affected appellant's rights and this court may give relief under Rule 52(b), F.R.C.P. Solomon v. United States, 133 App. D.C. 103, 408 F.2d 1306 (1968)

CONCLUSION

The judgment of the District Court should be reversed because of constitutional error in admitting the in-court identification of appellant by the witnesses.

Respectfully submitted,

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Attorney for Appellant
(Appointed by this Court)

ACKNOWLEDGMENT OF SERVICE

Service of a copy of the foregoing Brief of Appellant is acknowledged this day of October, 1970.

Assistant United States Attorney

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,049

UNITED STATES OF AMERICA, APPELLEE

v.

TERRANCE G. BLAIR, APPELLANT

Appeal from the United States District Court
for the District of Columbia

THOMAS A. FLANNERY,
United States Attorney.

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Cr. No. 202-69

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TABLE OF CASES

OTHER REFERENCES

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ISSUE PRESENTED *

In the opinion of appellee, the following issue is presented:

Whether the pre-trial identification procedures were suggestive and created a substantial likelihood of misidentification of appellant at trial.

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,049

UNITED STATES OF AMERICA, APPELLEE

v.

TERRANCE G. BLAIR, APPELLANT

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On February 12, 1969, the grand jury returned an eleven-count indictment charging appellant and two co-defendants, Charles E. Jones and Alfred L. Sweeney, with armed robbery, robbery, assault with a dangerous weapon and carrying a dangerous weapon, in violation of 22 D.C. Code §§ 3202, 2901, 502 and 3204, respectively. All the charges arose from a robbery of King's Liquor Store in Southeast Washington on November 12, 1968. Sweeney entered a plea of guilty to one count of armed robbery

on May 20, and on September 12 the District Court granted appellant's motion for relief from prejudicial joinder, thereby severing him from his other co-defendant, Jones, who was undergoing a mental examination at Saint Elizabeths Hospital. Appellant went to trial on November 19, 1969, before the Honorable June L. Green and a jury. On November 20 the jury found him guilty on two counts of armed robbery and two counts of assault with a dangerous weapon. On February 17, 1970, appellant was sentenced to imprisonment for three to fifteen years on each of the armed robbery counts and three to nine years on each of the assault with a dangerous weapon counts, the sentences to run concurrently. This appeal followed.

On December 3, 1968, a preliminary hearing for the three defendants was held before the United States Commissioner. Appellant was represented by an attorney from the E. Barrett Prettyman Legal Internship Program at Georgetown University. Prior to the hearing Sweeney had been identified by Richard Donaldson, a clerk in the liquor store and a witness to the crime, from a spread of photographs shown to him the day after the crime. Donaldson had also identified Sweeney at a lineup (P.H. Tr. 10, 12). Jones had been identified at a lineup by Fred Lukat, manager of the liquor store, who had also witnessed the crime (P.H. Tr. 27). Appellant was told that Donaldson had previously identified one of the other defendants and that he had a right to a lineup. However, against the advice of his counsel, appellant elected to waive the right to be placed in a lineup (P.H. Tr. 4-7). Thereafter, at the preliminary hearing, appellant was identified by Donaldson as one of the robbers whom he had a good opportunity to observe (P.H. Tr. 12-13, 16, 22). Lukat was not at the hearing because of illness (P.H. Tr. 29).

At trial the District Court held an evidentiary hearing on appellant's motion to suppress testimony relating to his identification (Tr. 5-46). Lukat testified that at the time of the robbery, about 3:00 p.m., he was in the back

of the store checking in some merchandise when he was accosted by two men with guns. One asked him where the gun was kept in the store. Lukat told him it was kept by the cash register up front. The gun was taken by the robber, who then ordered Lukat to open the cash register from which money was emptied (Tr. 7). Lukat testified that the store was lighted and he could see the man's face clearly. He saw two others with guns on Donaldson. Then Lukat was marched back to the rear, where Donaldson had also been taken, to open the safe. The same gunman who took Lukat to the cash register took him back to the safe (Tr. 8-9).

Lukat estimated the time elapsed at the cash register at about two or three minutes and at the safe four or five minutes (Tr. 10). He identified appellant as the robber who had taken him to the cash register and the safe and said, "He was the main speaker as far as I was concerned" (Tr. 13). He stated that the image of the man who had held up the store had stuck with him (Tr. 21-22), especially as to his eyes and broad nose.

On the day of the robbery Lukat gave descriptions to the police of the two men who had first accosted him. He described appellant as looking "like he had a little goatee . . . like somebody hadn't shaved in a while" (Tr. 11). Lukat was shown Government Exhibit 1-B, a photograph which had an inked-in goatee. He testified that this was one of a number of photographs he had been shown the day after the robbery and that he had identified the person in the photo as one of the robbers. The photograph did not then have the inked-in goatee. Lukat indicated that no suggestions of any kind had been made to him about the persons in the photographs and that the pictures had been all "mixed up" (Tr. 13-15).

Donaldson testified that he was at the counter in the front of the store when two men walked by toward the back of the store. Two more men entered; one asked for a match, and the other pulled a gun and announced a holdup. Donaldson was ordered to stand with his hands on a Coke machine until one of the two asked Donaldson

to show him where the safe was. Donaldson told them that only Lukat knew the combination. Lukat then was ordered back, and Donaldson stood beside the group at the safe as Lukat opened it (Tr. 26-27). Donaldson got a close look at the face of the man who had escorted Lukat and identified appellant as that man (Tr. 28).

Donaldson was shown Government Exhibit 1-B and identified it as one of the photographs exhibited to him on the day after the offense, but he stated that the inking was not on the photo when he had seen it (Tr. 30-31). He described appellant as having a "fuzzy or sort of unkept" mustache (Tr. 32-33).

Detective Harry Noone testified that Government Exhibit 1-B was one of a group of seven photographs of different individuals shown to Lukat and Donaldson the day after the crime. On the day the robbery occurred the police had exhibited another two or three dozen photographs from which the witnesses had made no identification (Tr. 34-39). Noone confirmed that both Lukat and Donaldson had independently picked out Government Exhibit 1-B as the photograph of one of the robbers. He testified that his partner had subsequently inked in the goatee on the picture (Tr. 36-38, 40).[1]

At the conclusion of the evidentiary hearing, the trial judge found:

> [B]oth complaining witnesses, Mr. Lukat and Mr. Donaldson, have been able to identify independently the defendant, in the first instance from photographs from which they selected the picture of the defendant Blair, and they have been able to identify him since that time in the courtroom. Both identifications will stand. (Tr. 46.)

Thereafter the jury was empaneled. In the course of the trial, Lukat and Donaldson repeated the substance of their identification testimony before the jury as well as other evidence pertaining to the commission of the robbery

[1] The photograph of appellant had been taken in July 1963 (Tr. 41).

(Tr. 67-80, 84-85, 90-101). The series of photographs shown to the witnesses by Detective Noone on the day after the robbery was also introduced into evidence (Tr. 112-116, 126).

ARGUMENT

The pre-trial identification procedures were not suggestive and did not create a substantial likelihood of misidentification of appellant at trial.

(Tr. 5-46, 150, 174-177; P.H. Tr. 1-29)

Appellant contends that the in-court identifications by Lukat and Donaldson were improper. As to Donaldson, he argues that the circumstances of the identification at the preliminary hearing, when only the three defendants were present, one of whom (Sweeney) Donaldson had previously identified, were so suggestive as to taint Donaldson's later in-court identification. As to Lukat, appellant apparently relies on the fact that Lukat made no physical identification of him for more than a year after the event.

The argument is clearly without substance under the applicable decisions. *Simmons* v. *United States*, 390 U.S. 377 (1968); *Stovall* v. *Denno*, 388 U.S. 293 (1967); *Clemons* v. *United States*, 133 U.S. App. D.C. 27, 408 F.2d 1230 (1968) (*en banc*), *cert. denied*, 394 U.S. 964 (1969). Both witnesses testified that they had ample opportunity to observe appellant during the robbery. The circumstances regarding the photographic identifications made the next day were free from any suggestiveness. As to the preliminary hearing, we submit on the basis of the record that appellant waived any right to complain about the potential suggestiveness of the identification which was made there by Donaldson. There is, however, no need to decide this question, since regardless of whether or not a valid waiver was given and whether or not the identification at that time was suggestive, it is evident that Donaldson's in-court identification had an independent source, namely, his initial viewing of appel-

lant during the robbery and the photographic identification the next day.[2] The fact that a year elapsed between Lukat's in-court identification and the crime obviously does not render his testimony inadmissible but merely goes to the weight to be given to that testimony by the jury, which obviously chose to accept it.[3]

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[2] No evidence concerning either the lineup or the preliminary hearing identification by Donaldson was heard by the jury. Both Donaldson and Detective Noone did testify before the jury with respect to the photographic identification.

We note that appellant appears to argue that the photographic showing was improper since he was in the hospital at the time, having been shot the night following the robbery (see Tr. 150). Noone testified, however, that he did not learn of the shooting (which appellant later said had been perpetrated by his co-defendant Jones) until two days later, and that he was unable to talk to appellant until his discharge nine days after the offense owing to appellant's critical condition (Tr. 174-177). The showing of the photographs was thus warranted in the interests of obtaining a prompt, reliable identification. *Cf. United States* v. *Green*, D.C. Cir. No. 22,710, decided November 12, 1970; *Solomon* v. *United States*, 133 U.S. App. D.C. 103, 408 F.2d 1306 (1969); *Russell* v. *United States*, 133 U.S. App. D.C. 77, 408 F.2d 1280, *cert. denied*, 395 U.S. 928 (1969); *Wise* v. *United States*, 127 U.S. App. D.C. 279, 383 F.2d 206 (1967), *cert. denied*, 390 U.S. 964 (1968).

[3] We are not unmindful of this Court's observations in *United States* v. *Gaines*, D.C. Cir. No. 23,369, decided August 27, 1970, regarding the failure of the police to "conduct a formal, in-person, untainted identification as soon after an accused's apprehension as is practicable . . . ." Slip op. at 4. We submit, however, that *Gaines* is sufficiently distinguishable on its facts to merit only passing mention here. Most significantly, *Gaines* was a narcotics case involving a single undercover police officer who purchased narcotics from the defendant on only one occasion. Such cases present special problems in the area of identification, as this Court has often recognized. *E.g., Ross* v. *United States*, 121 U.S. App. D.C. 233, 349 F.2d 210 (1965). Moreover, in the case at bar appellant was identified in person by Mr. Donaldson at the preliminary hearing only three weeks after the robbery. This fact, together with the fact that appellant waived whatever right he had to be placed in a lineup—assuming *arguendo* that he had any such right—should vitiate any conceivable error arising from the absence of a corporeal identification of appellant by Mr. Lukat prior to trial.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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